

FRACTURING THE SKELETON OF PRINCIPLE: AUSTRALIAN LAW, ABORIGINAL LAW, AND DIGITAL TECHNOLOGY

Michael Christie

Charles Darwin University

Introduction

Aboriginal people in Australia today are constructing extremely diverse cultures. Increasingly, these cultures involve some aspect of digital technologies - videos, DVDs, CDs, digital photos, audiofiles etc. Emerging Aboriginal digital environments are affecting the intergenerational transmission of traditional culture wherever Aboriginal people are using digital technologies in their work of (re)producing culture in cities, towns and very remote locations. The work which is being done in some of these contexts is discussed in other papers (Christie, 2001, 2004, 2005) and on a project website (www.cdu.edu.au/ik).¹

This paper is about how the resources Aboriginal people produce in their own digital environments can be viewed by Australian law. My title is taken from Justice Brennan, writing in reference to the Mabo case: a willingness to engage flexible interpretations of legal doctrine to reflect Aboriginal

¹ We should remember that Aboriginal adolescents are as fully engaged in the processes of cultural construction as their older relatives even if the digital resources in their hands (gameboys, hip-hop CDs, ghetto blasters) apparently have little to do with traditional culture. {Groome, 1995}.

interests should be welcomed, he wrote, provided this does not ‘fracture the skeleton of principle’ of Australian law.

This is not the legal story of the intellectual property (IP) which is growing alongside the sudden flowering of “databases of indigenous knowledge”. Such databases until now have mostly involved a collaboration between Aboriginal and nonAboriginal developers, when much of the technical work is inevitably under nonIndigenous control.² The Intellectual Property around all this is complicated. This will be the case for a long time, not because databases are highly technical objects to operate, but because the way they do things with knowledge, the ways they ‘intellectualise’ it³, seems quite foreign to the Aboriginal work of keeping knowledge traditions strong. It doesn’t seem to help that much with the work which Aboriginal parents and grandparents are doing towards young people’s induction into the knowledge traditions which have kept their family identity together over the generations. This is of course as true in the city as it is in remote homelands.

Uses of Digital technologies in Indigenous Knowledge Work

Aboriginal people are using digital technologies in their own ongoing work of creating and re-creating culture through collective memory, in the form of digital resources. For example, some people are using recordings of ancestral songs originally performed by people now deceased, and repatriated from archives in Canberra. Some of these are organised using special software

² For a report on all the archives of Aboriginal knowledge we have found in the Top End of Australia, see www.cdu.edu.au/ik

³ See for example <http://www.waoe.org/africanknowledge/encyclopaedia.html> for a detailed plan which includes intellectualising African knowledge.

developed for managing digital resources like iTunes. Other people are making digital collections of their own photos which they want to keep safe and show only to their immediately family, and use them to share stories which strengthen family identity. Some people are using digitised maps adding names and photos which were generated or collected to support Native Title claims, to tell their children their history. They use them to teach young people the Aboriginal names of places when they only know the English names.

People are using digitised version of old photos repatriated from museums and missionary organisations to piece together the histories of their families. Others make video and audio recordings of ceremonies to take home to show those who couldn't attend, and to allow very old people to comment on how well performed and received it was, and remind people of the old connections which make it true. One man made a video of himself standing on his land telling the story of that land for other people (Aboriginal and nonAboriginal) who haven't been there and may not know the full story of its history, its ownership and who is taking care of it.

Other Aboriginal people are using digital technologies at school, bringing together groups of elders to tell stories of the land for children who haven't heard them yet, and making DVDs and other multimedia educational resources.

How the knowledge resources are organised and controlled

The local Aboriginal digital knowledge resources we have come across generally belong principally to one person rather than to a group or community organisation, and other people are

given access to them under particular conditions in particular contexts. There are strong traditional principles of rights and responsibilities which govern their management. The owners and makers show a strong commitment to identifying the right people in right places telling their own stories. Individuals develop their own file management systems at their personal or family level and are uncomfortable about the idea of having all the knowledge of a community put into the one database. This is not so much because they don't want people to have access to their own resources, but rather because they undertake to manage their resources properly. Equally they are keen to avoid being held responsible in any way for the management of, and particularly the access to the resources of others.⁴

People use the digital resources in a social context as props or artefacts, in the same way that they would use nondigital resources like paintings, photos, diagrams, ceremonial objects, and of course the land itself and natural phenomena in talking about and representing themselves and their histories, and making agreements.

In some contexts, this work is just people chatting together, reminiscing, enjoying being able to look at, represent and listen to traces of history and build the collective memory of the group. In other contexts, the use of Aboriginal digital resources is serious business, making claims about ownership, about rights and responsibilities, and appropriate behaviour. In these cases the ways that the resources are identified and validated, the way they are accessed and displayed and the ways assemblages are put together and used in context, is a crucial part of the knowledge production process, and negotiations over resources. People tend to be focussed on keeping the narratives of their history and identity alive, so they are more interested in storing videos, sound

⁴ There is a contrast here with file management and database systems in place like knowledge centres and land management organizations, where people pool resources across these family/clan boundaries.

files, and photographs than ‘information’ about particular places or species. We find mostly audio, video and images, not much text.

Aboriginal law and digital technology

Aboriginal digital objects in Aboriginal hands are a special case of Intellectual property in that they are not yet caught up in the white Australian knowledge economy. They can be used in an entirely Aboriginal social context. They can join in the entirely Aboriginal work of creating Aboriginal culture anew using Aboriginal rules and processes for making and validating claims to the truth. When they do this they are subject to Aboriginal law long before they are implicated in Australian law.

The computer doesn’t contain knowledge so much as traces of previous episodes of knowledge production. It has memory, but memories are not enough to keep knowledge, language and culture alive. Each new generation needs to learn how to perform (act, talk, dance, sing, paint, justify, elaborate ...) their world into a new existence day by day. We all use memory resources to perform that work. Some of our resources are digital, and others are not. But one way or another we need to make representations, and share them with people who will watch, think, assess, and pass judgement.

Many elders are concerned that important distinctions which need to be made between groups of people in ceremonial practice, song or art, get blurred and confused when young people don’t get to visit land regularly. The land contains artefacts, memories and traces of previous knowledge-

making episodes, just as a database. The land can be understood to have memory as a computer has memory. Digital databases with map interfaces seem to help tie stories to places.⁵ The work of Aboriginal cultural production, does not lie *inside* digital objects, but rather in the *performances and negotiations* over those objects. The cultural, political and religious work lies in their assessment and exchange. In the same way that complex negotiations always precede ceremonial performance, similar negotiations surround the production and display of Aboriginal digital resources.

Australian Law, and Aboriginal digital environments

When people's stories are mixed up and put into an archive – say about plants and their uses as food or medicine - two things happen: First, the information is usually no longer much use in the work that old people do transferring knowledge traditions to young people. The data have been stripped away from their underlying stories and the connections which embedded them in Aboriginal knowledge traditions. Second, the intellectual property gets all mixed up (in both Aboriginal and Australian systems of law). Some people try to get around that by saying that the IP belongs to the community as a whole, but this may not be the best way to solve it. Until (and probably after) community ownership is properly negotiated and ratified, each piece of information or each digital resource needs to have an owner.

In Australian law, trade marks (like Nike or CocaCola), patents on inventions (like a cane toad trap), works of art (like musical recordings and bark paintings) are all protected under Intellectual

⁵ See for example http://www.cdu.edu.au/centres/ik/db_larrakia.html

Property law. You can't start making runners and call them Nikes. Nor can you make a copy of someone's painting and sell it on a tea towel or carpet. IP law has sometimes been used successfully to protect Aboriginal ownership of Aboriginal cultural products. This view of rights over Aboriginal culture as *proprietary*, implies some sort of a compromise of the true relationship between people and their natural/cultural worlds. It's like the old and very significant argument that is often made, that in Aboriginal law, the idea that *people belong to the land* is more important and fundamental and in fact prior to the idea that *land belongs to people*. The land is as much a result of the ancestral creative work, as are the peoples who belong to various places, and their languages, songs and art. The notion of property in Australian law does not do justice to Aboriginal notions of relatedness, origins and identity. Neither the land nor the people comes first. Both are effects of something prior and more fundamental.

If my knowledge resources are in a large database belonging at least in part to some government or nongovernment agency, then it is the content of the database which is subject to legal discussion. In Australian law, it is simply a technical matter of ownership, nothing to do with ethics, politics or culture. Talking about Bromley the teddy bear who climbed Uluru, Steve Gray (2005) points out that "when a photographer takes an image, that image is still his or her intellectual property. The fact that it may offend Anangu religious or cultural sensibilities is secondary" (p.38). He also makes clear that giant databases, like one proposed by the World Bank, have been seen as a solution to the protection of Indigenous expression because it puts all the issues in the public arena

with well-funded legal support. Attention to the ways such archives are used could give rise to a new or extended legal definition of intellectual property.⁶

If however I avoid putting my digital resources into a larger collection and keep them for myself on my own computer (as seems to be happening in the Aboriginal contexts we have identified), the question of rights and access is not so problematic (Daes, 2004). It only comes up when I agree to select some of my resources and to share them with you in a particular time and place under circumstances to which we both agree: *a contract*.

That part of Australian law which is referred to as contract law, has in fact according to Gray been a more useful tool than IP law, for the protection of indigenous knowledge and resources. The benefit I may gain through using your resources is governed by a contract or agreement which you and I make, and which can be argued over in court if I misuse it. This law seems in some ways more consistent with the ways in which Aboriginal people work in their digital (and other) cultural contexts. The main problem with contract benefit sharing is that the contracts don't provide any protection against *third parties*. If someone takes and sells what you have given me, you are not able to claim any rights over what he has done with it.

There is a further problem. If someone designs a database, and I put my digital resources into it, and then I use the database software to bring those resources together in a particular way for a particular purpose, the logic of that configuration may in fact be understood as part of the copyright

⁶ See for example <http://www.waoe.org/africanknowledge/encyclopaedia.html>. But Erica Daes, from the United Nations, in a lecture called the impact of Globalization on Indigenous Intellectual Property and Cultures, http://www.hreoc.gov.au/speeches/social_justice/indigenous_ip.html expresses grave doubts about the idea.

of the programmer, and therefore the arrangement doesn't necessarily belong to me. The court might find that it's not my IP.

Conclusion

In years to come, many of these issues will be decided in the courts, in reference to Australian law and international conventions. From these decisions may emerge a coherent principle which can be depended upon, or a set of amendments to protect Aboriginal knowledge in all its many forms. If we look at the ways in which Aboriginal people in their own contexts are currently dealing with their own digital resources in their own ways, (rather than in hybrid contexts where two laws apply) we may find that the Aboriginal law which is already at work there, is more recognisable through Australian contract law, than it is through Australian intellectual property law. The interactivity which is at the bottom of both Aboriginal law and of Australian contract law may provide the way ahead.

Whichever way it turns out, people working within Australian law to protect Aboriginal knowledge need to look carefully at how traditional law in local contexts is already starting to govern ways in which digital environments are configured and managed. A careful analysis might help with the development of a law reform agenda and a legal practice which is equally committed to protect from fracture "the skeleton of principle" of Aboriginal law.

References

Christie, M. (2001) "Aboriginal Knowledge on the Internet." *Ngoondjook*(19): 33-51.

Christie, M. (2004) "Computer Databases and Aboriginal Knowledge." *Learning Communities: International Journal of Learning in Social Contexts*(1): 4-12.

Christie, M (2005) "Words, Ontologies and Aboriginal Databases", *Multimedia International Australia*, vol. 116, pp. 52-63.

Daes, E-I. A. (2004). The impact of globalization on Indigenous Intellectual Property and Cultures. Lecture by Professor Dr. Erica-Irene A. Daes, 25 May 2004, Museum of Sydney, Sydney Australia. Retrieved September 30, 2005 from http://www.hreoc.gov.au/speeches/social_justice/indigenous_ip.html

Gray, S (2005) 'What's Biting Bromley? Intellectual Property and Indigenous Cultural Values', *Ngoonjook*, vol. 26, pp. 35-43.

Groome, H. and A. Hamilton (1995) "Meeting the Educational needs of Aboriginal Adolescents". Canberra, National Board of Employment, Education and Training